

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

Case No. 13-cr-20426

v

Honorable Thomas L. Ludington
Magistrate Judge Patricia T. Morris

MICHAEL ANTHONY GOMEZ,

Defendant-Petitioner.

**ORDER ADOPTING REPORT AND RECOMMENDATION, GRANTING IN PART
AND DENYING IN PART MOTION TO VACATE, VACATING PETITIONER'S
SENTENCE, REFERRING MATTER TO MAGISTRATE JUDGE FOR
APPOINTMENT OF COUNSEL, DIRECTING THE PROBATION DEPARTMENT TO
AMEND THE PRE-SENTENCE INVESTIGATION REPORT AND SCHEDULING
RE-SENTENCING HEARING**

On June 5, 2013, Petitioner Michael Anthony Gomez was charged with being a felon in possession of numerous firearms in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). ECF No. 11. Gomez entered a guilty plea on August 29, 2013. He was then sentenced as an armed career offender to 200 months of imprisonment, three years of supervised release, and a special assessment fee of \$100 on December 12, 2013. Judgment was entered that same day. *See* ECF No. 25.

Gomez filed a motion to vacate his sentence on October 13, 2015. ECF No. 26. Gomez argued that his status as an armed career offender under the Armed Career Criminal Act (“ACCA”), and therefore his sentence, necessarily depended on a conviction that fell under the ACCA residual clause, and that he was therefore entitled to relief under the United States Supreme Court’s decision in *United States v. Johnson*, 135 S. Ct. 2551 (2015). He also argued that his former counsel had been ineffective. In its response, the United States agreed with

Gomez's *Johnson* argument, but disputed all of his additional claims for relief. The United States therefore urged this Court to grant Gomez's motion in part, and resentence him without the ACCA enhancement. *See* ECF No. 31.

On March 23, 2016 Magistrate Judge Patricia T. Morris issued a report recommending that Gomez's motion be granted in part and denied in part. ECF No. 32. Judge Morris agreed that the Supreme Court's decision in *Johnson* required that Gomez be resented without the ACCA armed career offender enhancement. She rejected his claim of ineffective assistance of counsel.

Although Magistrate Judge Morris's report explicitly stated that the parties to this action could object to and seek review of the recommendation within fourteen days of service of the report, neither Petitioner nor Respondent have filed any objections. The election not to file objections to the Magistrate Judge's report releases the Court from its duty to independently review the record. *Thomas v. Arn*, 474 U.S. 140, 149 (1985). The failure to file objections to the report and recommendation waives any further right to appeal.

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation, ECF No. 32, is **ADOPTED**.

It is further **ORDERED** that Petitioner Gomez's motion to vacate, ECF No. 26, is **GRANTED IN PART AND DENIED IN PART**.

It is further **ORDERED** that Petitioner Gomez's sentence is **VACATED**.

It is further **ORDERED** that this matter is **REFERRED** to Magistrate Judge Patricia T. Morris for the purpose of appointing Defendant Gomez counsel pursuant to the Criminal Justice Act.

It is further **ORDERED** that the Probation Department is **DIRECTED** to amend Petitioner Gomez's presentence investigation report.

It is further **ORDERED** that Petitioner Gomez's re-sentencing hearing is **SCHEDULED** for **July 28, 2016 at 3:30 PM**.

It is further **ORDERED** that Petitioner Gomez shall remain in federal custody pending the resentencing hearing.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: April 26, 2016

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on April 26, 2016.

s/Michael A. Sian
MICHAEL A. SIAN, Case Manager